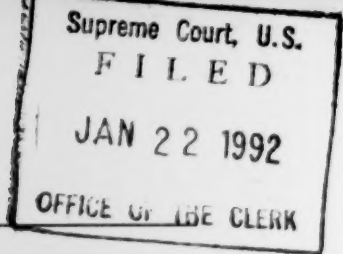


(2)
No. 91-1037



IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1991

GENUINE PARTS CO., INC., a Georgia corporation; and
ECHLIN, INC., formerly ECHLIN MANUFACTURING
COMPANY, a Connecticut corporation,

Petitioners,

vs.

JESS WESLEY CRAWFORD, DIANE LA PLANTE, and
RODNEY LANE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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JURISDICTION

Respondents (Plaintiffs) do not question jurisdiction.

QUESTIONS PRESENTED FOR REVIEW

This is a products liability case in which the Plaintiffs, three members of the Blackfeet Indian Tribe, were injured in an automobile accident on the Blackfeet Indian reservation, allegedly, as the result of defective automobile parts manufactured, distributed and sold by the Petitioners (Defendants).

Defendants contend that the Court of Appeals erred in requiring the District Court to defer to the Tribal Court because (1) the issues raised by the facts are not sufficiently tied to reservation interests and (2) the District Court had the discretion to determine that the assertion of Tribal Court jurisdiction by the Plaintiffs was not timely.

STATEMENT OF THE FACTS

Defendants' statement of the facts is substantially correct except that it omits significant facts, therefore, Plaintiffs provide this brief statement which is necessarily repetitious.

On December 20, 1982, Plaintiffs, all of whom are enrolled members of the Blackfeet Tribe, were severely injured (Crawford is quadriplegic) in an automobile accident which occurred within the boundaries of the Blackfeet Indian Reservation situated in the State of Montana. Defendants are automotive parts manufacturers and distributors from outside the State of Montana who sell their nationally advertised (NAPA) replacement parts throughout the United States, including Montana and the Blackfeet Reservation.

Plaintiffs commenced their lawsuits in 1984 (Crawford first and later LaPlante and Lane) in state district court against these Defendants and others, some of whom were Montana residents.

One of the cases (Crawford's) was set for trial, with discovery closed, in the state court for January 26, 1987. Shortly before that date, Plaintiffs settled and dismissed their claims against the other defendants in the state court, leaving only these out-of-state Defendants as parties.

These Defendants removed the case to the Federal District Court on January 13, 1987, based upon diversity jurisdiction. The Federal District Court assumed jurisdiction, set new discovery schedules and consolidated the cases at Defendants' request, and set the trial for May 2, 1989.

When Plaintiffs commenced these lawsuits (Crawford in July of 1984), the law was not clear that they should have been commenced in the Blackfeet Tribal Court. They did not become aware of mandatory deference until April 7, 1989. On April 10, 1989, Plaintiffs apprised the Federal Court of how and when they became aware that original jurisdiction was properly before the Blackfeet Tribal Court and moved that the case be transferred there.

Four days thereafter, on April 14, 1989, all of the parties, including Defendants, entered into a written stipulation agreeing that the trial date should be vacated because there was a "serious question as to whether any further proceedings by this Court would be a nullity" and that "further expense and inconvenience" would be avoided by vacating the trial until it was determined whether the Federal District Court

had the authority to proceed.

Approximately a year later, on May 8, 1990, the Federal District Court denied Plaintiffs' motion to transfer the case to the Blackfeet Tribal Court stating:

The failure of the Plaintiffs to seasonably avail themselves of the opportunity to adjudicate the controversy in the Blackfeet Tribal Court precludes them from invoking the exhaustion rule.

Tacitly, the District Court agreed with Plaintiffs that the Blackfeet Tribal Court had original jurisdiction but refused to relinquish jurisdiction because it found Plaintiffs' request untimely.

The District Court expressed some uncertainty as to its opinion and Plaintiffs were permitted to appeal pursuant to 28 U.S.C. Sec. 1292(b). The Ninth Circuit Court of Appeals agreed to hear the appeal. Upon hearing, it remanded the case to the District Court with directions to dismiss or abstain in favor of the Tribal Court proceeding, finding that the "dispute arose on the reservation" and Plaintiffs' motion to transfer the case to Tribal Court was not made in "bad faith."

ARGUMENT

I.

THE WRIT SHOULD NOT BE GRANTED

There are no special and important reasons for granting the Writ, and the Court of Appeals' decision is neither in conflict with recent decisions of other courts of appeal or the decisions of this Court, as required by Rule 10 of this Court.

On the contrary, the decision is consistent with this Court's decisions in *National Farmers Union v. Crow Tribe of Indians*, 105 S.Ct. 2447, 471 U.S. 845 (1985), the leading case on tribal court jurisdiction, and *Iowa Mutual Ins. Co. v. LaPlante*, 107 S.Ct. 971, 480 U.S. 9 (1987), as well as recent decisions of the federal courts, *Burlington Northern R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, (9th Cir. 1991); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221 (9th Cir. 1989); *Wellman v. Chevron U.S.A., Inc.*, 815 F.2d 577 (9th Cir. 1987); *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.3d 1411, (9th Cir.) cert. den. 476 U.S. 1117, 106 S.Ct. 2008 (1986); *Brown v. Washoe Housing Authority*, 835 F.2d 1327, 1328 (10th Cir. 1988). The cases variously express the view that since the development of the tribal court system on the reservations, those courts have the inherent power and the right to determine civil disputes affecting the interests of Indians and non-Indians arising on the reservation.^{1,2} In effect, they mandate that federal courts dismiss or abstain from deciding such cases until tribal remedies are exhausted.³

¹*National Farmers Union v. Crow Tribe of Indians*, cited *supra*, holds tribal courts may exercise civil jurisdiction over non-Indians in a personal injury action arising on the reservation; that federal courts must defer to tribal courts until tribal remedies are exhausted, and that judicial preference for tribal court exhaustion accords with Congressional preference for tribal self-government.

²*Iowa Mutual Ins. Co. v. LaPlante*, cited *supra*, holds that civil jurisdiction over the activities of non-Indians on reservations presumptively lies in the tribal court unless limited by either treaty or statute and that neither the diversity statute nor its history suggest Congressional intent to override the federal policy of deference to tribal courts.

³*Stock West v. Confederated Tribes*, cited *supra* (p. 1228), holds that a party cannot either consent to or waive jurisdiction.

II.

THE COURT OF APPEALS CORRECTLY FOUND THIS CASE SUFFICIENTLY TIED TO RESERVA- TION INTERESTS TO WARRANT INVOKING THE EXHAUSTION RULE

Defendants argue, commencing at page 9 of their brief, that:

This case is not sufficiently tied to reservation interests to warrant invoking the exhaustion rule ... over which it, like the state court from which the controversy was removed, had jurisdiction.

Defendants' statement that the State Court had concurrent jurisdiction is incorrect. The State Court had no jurisdiction. This was determined by the Montana Supreme Court in *Geiger v. Pierce*, 758 P.2d 279, 233 Mont. 18 (1988), which reluctantly determined that state courts had no jurisdiction over civil actions arising within the boundaries of an Indian reservation and set aside a state court judgment.

The Federal District Court has concurrent jurisdiction but must, as was decided here by the Court of Appeals, defer to the Tribal Court which has the first right to make whatever decisions are proper.

The principal thrust of the Defendants' argument is that because the parts were manufactured outside the reservation and in this instance were purchased and installed in Columbia Falls, Montana, a town off of the reservation, there is not a sufficient "reservation interest".

Defendants place their NAPA products into the stream of commerce; they are advertised, sold and used throughout the United States and the Blackfeet Reservation.

The Blackfeet Nation has some 13,000 enrolled Indians, approximately half of whom live within the boundaries of the reservation. Contrary to Defendants' assertion, the Defendants' activities may affect and threaten the economic security and welfare of the Tribe as a whole, at least as much or (by reason of the communal character of reservation life, and their limited health resources) more than they affect a citizen of one of the states, each of which applies its own liability laws based upon the primary fact that the injury occurred within its boundaries.

As stated in 4 Wright & Miller, Federal Practice and Procedure, Sec. 1069:

It seems appropriate for the place of injury to assert jurisdiction when the entry of defendant's products or parts into the forum is part of a consistent pattern of multi-state business so that it is reasonable for him to foresee the potential dispersion of his products at the time they are sold. (pp. 391-392)

The incongruous result of adopting Defendants' position would permit everyone in the United States to bring a lawsuit against the manufacturer of a defective product in his own state, and have the matter decided under the law of that state if it was the situs of the injury, except for Indians who live on reservations. Such a result could permit reservations to become the dumping grounds for defective products.

This fundamentally unfair result was clearly not the intention of *National Farmers Union v. Crow Tribe*, *Iowa Mutual Ins. Co. v. LaPlante*, and their progeny, some of which are cited *supra*, which are directed toward the furtherance of tribal self-government and mandate deference to tribal courts.

III.

THERE IS NO MERIT IN THE DEFENDANTS' ARGUMENT THAT PLAINTIFFS' ASSERTION OF TRIBAL JURISDICTION WAS UNTIMELY AND WASTED JUDICIAL RESOURCES

Defendants assert that the Plaintiffs were responsible for failing to invoke tribal jurisdiction earlier. In fact, the Defendants and the Court itself had an equal responsibility.

Defendants' brief (p. 22) argues that Plaintiffs "belatedly" invoked the exhaustion rule which resulted in wasting significant judicial resources entitling the District Court as a matter of wise judicial administration to refuse to defer to the tribal court.

First, the cases requiring exhaustion of tribal remedies were decided after 1984, the year in which these lawsuits were commenced in the State Court. *National Farmers Union v. Crow Tribe* was decided in 1985 and *Iowa Mutual Ins. Co. v. LaPlante* in 1987. It was not unreasonable for the Plaintiffs to be unaware of the Indian jurisdictional case law evolving while the lawsuit was pending. The record shows that as soon as they learned that jurisdiction was properly in the Tribal Court, they called it to the attention of the Federal District Court and moved to transfer it.

There was no less an obligation upon the Defendants, and indeed upon the District Court itself, to be aware of the evolving case law. As stated in 13 Federal Practice & Procedure (Wright, Miller, Cooper), Sec. 3522, pp. 69, 70:

[E]ven if the parties remained silent, it is well settled that a federal court, whether trial or appellate, is obliged to notice on its own motion the want of its own jurisdiction ... (cases cited footnote 12)

Second, it is not true that the Plaintiffs engaged in delaying tactics. The record⁴ bears out that Plaintiffs prosecuted the case with diligence, and that it was the Defendants who engaged in delaying tactics. It is common knowledge that delay does not usually inure to the benefit of indigent plaintiffs.

Third, as stated previously herein, four days after the Plaintiffs made the motion to transfer the case to the Tribal Court, the Defendants agreed in a written stipulation that judicial resources may be wasted if jurisdiction was not determined before proceeding to trial.

⁴ *A & A Concrete v. White Mountain Apache Tribe*, cited *supra* (p. 1417), holds that the record must show that jurisdiction is asserted in bad faith or with a motive to harass in order to come within *National Farmers Union's* exception to mandatory deference.

Fourth, as stated in 13 Federal Practice and Procedure (Wright, Miller & Cooper), Sec. 3522, pp. 66, 67:

[P]arties cannot waive lack of jurisdiction by express consent, or by conduct, or even by estoppel; the subject matter jurisdiction of the federal courts is too basic a concern to the judicial system to be left to the whims and tactical concerns of the litigants. (Cases cited in footnotes.)

Finally, none of the cases addressing tribal jurisdiction even suggest that time limitations exist with regard to the invocation of tribal jurisdiction or that parties may waive their right to exhaust their remedies.⁵

The Ninth Circuit Court of Appeals' decision in *Stock West v. Confederated Tribes*, cited *supra*, succinctly reviews the principles applicable here:

In considering the jurisdiction questions, it should be remembered that "[i]t is a fundamental principle that federal courts are courts of limited jurisdiction." *Owen Equip & Erection Co. v. Kroger*, 437 U.S. 365, 374, 98 S.Ct. 2396, 2403, 57 L.Ed. 2d 274 (1978). A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears. *California ex rel. Younger v. Andrus*, 608 F.2d 1247, 1249 (9th Cir. 1979). (p. 1225)

⁵*Burlington Northern R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991), holds the requirement of exhaustion of tribal remedies is not directory; it is mandatory.

... the Court in *Iowa Mutual* noted that civil jurisdiction over the activities of non-Indians on reservation lands "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." 480 U.S. at 18, 107 S.Ct. at 978. The court went on to point out that in matters concerning reservation affairs, "tribal courts are best qualified to interpret and apply tribal law." *Id.* at 16, 107 S.Ct. at 977. (p. 1228)

[A] party cannot waive by consent or contract a court's lack of *subject matter* jurisdiction, *Securities & Exchange Commission v. Blazon Corp.*, 609 F.2d 9600, 965 (9th Cir. 1979). (p. 1228)

... under *National Farmers*, the federal courts should not even make a ruling on tribal court jurisdiction in this case until tribal remedies are exhausted. (p. 1228)

[E]xhaustion of tribal remedies is a prerequisite to a federal action, ... (p. 1229)

"[C]ongress is committed to a policy of supporting tribal self-government and self-determination." *National Farmers*, 471 U.S. at 856, 105 S.Ct. at 2454 (footnote omitted), and that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Iowa Mutual*, 480 U.S. at 18, 107 S.Ct. at 978. Indeed, "[i]n diversity cases, ... unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs." *Id.* at 16, 107 S.Ct. at 977. (p. 1230)

CONCLUSION

1. The civil jurisdiction of the Blackfeet Tribal Court is not limited by any treaty provision or federal statute placing time limitations on invocation of its jurisdiction. The limitation rule imposed by the district court does not comport with either Congressional intent to encourage tribal sovereignty or this Court's mandate to uphold it.

2. The Court of Appeals' decision correctly found in accord with the federal courts' decisions that the District Court was required to defer to the Tribal Court under the facts.

3. Contrary to Defendants' contentions, the state court has no jurisdiction and serious reservation interests are involved. The injury occurred on the Blackfeet Reservation, and the injured parties are all members of the Blackfeet Tribe.

Defendants' activities in placing their allegedly defective products within the stream of commerce so that they are used and sold throughout the United States and the Blackfeet Reservation, are activities which may foreseeably affect and threaten the economic security and the welfare of the tribe as a whole.

4. The record discloses that the Plaintiffs, who had no more obligation to be aware of the evolving Indian jurisdictional case law than either the Defendants or the District Court, were neither dilatory nor acting in bad faith when they invoked tribal jurisdiction as soon as they learned it was proper.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted this 15th day of January, 1992.

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